



OFFICE OF FINANCIAL MANAGEMENT

STATE OF WASHINGTON

REGULATORY REFORM UNDER ESHB 1010

**IMPACTS OF SIGNIFICANT LEGISLATIVE RULEMAKING REQUIREMENTS
(2002-2003)**

GOVERNOR'S EXECUTIVE POLICY OFFICE

JANUARY 2004



STATE OF WASHINGTON

OFFICE OF FINANCIAL MANAGEMENT

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January 2004

TO: Governor Gary Locke
Senator Bill Finkbeiner
Senate Majority Leader

Representative Frank Chopp
Speaker of the House
Senator Lisa Brown
Senate Minority Leader

Representative Richard DeBoldt
House Minority Leader

FROM: Marty Brown, Director

SUBJECT: Biennial Report on the Effects of ESHB 1010 Regulatory Reform

This report is required of the Office of Financial Management (OFM) by Engrossed Substitute House Bill 1010, the regulatory reform measure approved by the Legislature and signed into law in 1995.

The report summarizes the experience of state regulatory agencies in making rules under the significant legislative rule making provisions of the law during 2002 and 2003. In compiling the report, OFM asked agencies to consult with their clients, customers, and representatives of the regulated community in assessing their experience with the law. OFM has summarized their experience, and included the reports from individual agencies in the Appendix of this document.

If you require more detailed information about the effect of this law, please contact the agencies directly.



Regulatory Reform Under ESHB 1010

Impacts of Significant Legislative Rulemaking Requirements (2002-2003)

JANUARY 2004

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Regulatory Reform Under ESHB 1010

Impacts of Significant Legislative Rulemaking Requirements (2002-2003)

ENGROSSED SUBSTITUTE HOUSE BILL (ESHB) 1010, the omnibus regulatory reform bill enacted in 1995, imposed many new regulatory duties on state agencies. Among these new duties were more detailed rulemaking requirements for “significant legislative rules” under RCW 34.05.328. Significant legislative rules are defined as those that are used to adopt substantive provisions of law, the violation of which results in a penalty or sanction, establishes or changes qualifications for a license or permit, or results in a significant change to a policy or regulatory program.

Significant legislative rulemaking requirements include that agencies determine the costs and benefits of a new rule, determine least burdensome alternatives, coordinate regulations with the requirements of state and federal law, and develop an implementation, evaluation, and education plan.

A copy of RCW 34.05.328 is attached to this report as Appendix A.

ESHB 1010 also requires the Office of Financial Management (OFM) to report on the experience of the named regulatory agencies in carrying out these rulemaking requirements in January of each even-numbered year. This report summarizes the implementation reports received by OFM from the following agencies: the Departments of Ecology (DOE), Labor and Industries (L&I), Health (DOH), Revenue (DOR), Social and Health Services (DSHS), Employment Security (ESD), Fish and Wildlife (DFW), the Forest Practices Board (FPB), Natural Resources (DNR), and the Office of the Insurance Commissioner (OIC). ESD and DFW reported no adoption of significant legislative rules and therefore no impacts over the last two years.

The reports explain the agencies’ experiences with significant legislative rulemaking for calendar years 2002 and 2003. They contain a list of rules adopted under the requirements of RCW 34.05.328, the impacts on the substance of the rules, a summary of additional costs associated with the process, a description of any legal actions for failure to comply with the requirements, adverse effects of the law, and a summary of the comments from the regulated community and others regarding the requirements and the acceptability of rules adopted under them.

This year OFM also requested comments on RCW 34.05.328 from business associations, environmental and labor organizations, and city and county associations. One response was received, which is Appendix C to this report.

Copies of each of the agencies’ reports are attached as Appendices B1 through B-7

Types of Rules and Impacts on Substance

Agencies adopt a wide variety of significant legislative rules. The individual reports include a complete list of the significant legislative rules adopted. Examples of such rules adopted during the last two years include:

DOE

- Motor Vehicle Emission Inspection
- Solid Waste Handling Standards
- Water Quality Standards for Surface Waters
- State Environmental Policy Act

DOH

- AIDS/HIV Counseling and Testing
- Home Health, Hospice, and Home Care Licensing
- Vital Records – Certificates
- Newborn Screening

OIC

- Automobile Claims and Total Loss Settlements
- Pharmacy Cards
- WSHIP Plan of Operation
- Electronic Filing of Financial Information
- Use of Credit Information

L&I

- Vocational Rehabilitation
- Railroad Clearances

DNR

- Residential Use of State-Owned Aquatic Lands

DSHS

- Emergency Respite Centers
- Voluntary Placement Program for Developmentally Disabled Youth
- Caregiver Training Requirements for Home and Community Programs
- Boarding Home Rules
- Certification Requirements for Chemical Dependency Service Providers
- Mail Order Pharmacy Services for Medicaid Clients

As past reports have indicated, the impacts of significant legislative rulemaking requirements on the substance of the rules vary from agency to agency. A number of the agencies reported that the increased stakeholder participation in the rules process assisted in the rule development. DSHS's Aging and Disability Services Administration reported extensive stakeholder work in the development of the new boarding home rules and a fifteen-month delay in their effective date to respond to concerns of the boarding home industry. Despite this process, a lawsuit has been filed over both the content of the rules and the process used to adopt them.

DOE reports that the requirements of RCW 34.05.328 make the staff more thoughtful and deliberate about decision-making during rulemaking, and that sharing this information with stakeholders results in more specific comments from stakeholders and better understanding of the decision-making by the agency.

Cost Impacts

Most of the agencies did not submit detailed cost information. However, agencies adopting significant legislative rules noted the increased staff time necessary to adopt the rules.

Legal Actions

The Washington State Supreme Court has accepted *Washington Employers Concerned about Regulating Ergonomics, et. al., v. Dep't of Labor and Indus.*, Case No. 4 73020-2, regarding the ergonomics rules adopted by L&I. Oral argument was heard on May 22, 2003. The case specifically argues that the rules were not properly adopted, largely because the cost-benefit analysis performed by the agency was not adequate. Because of the success of Initiative 841, invalidating the rules, it is thought that the Supreme Court may declare the case moot and decline to issue an opinion.

The Association of Washington Business (AWB) has also filed several lawsuits challenging DOR's rulemaking authority. In *Association of Washington Business v. Dep't of Revenue*, AWB argues that DOR lacks general rulemaking authority as a result of changes made by ESHB 1010 in 1995. This lawsuit is currently pending in the Court of Appeals; three rules were invalidated at the Superior Court level, although not for the reasons advanced by AWB. AWB has filed a second lawsuit arguing the invalidity of most of DOR's excise tax rules on the basis of the first lawsuit. AWB has not argued specifically about the provisions of RCW 34.05.328.

DSHS reports that the Assisted Living Legal Defense Fund has filed suit, challenging both the content and rulemaking process used for the adoption of the revised boarding home rules. In addition, suit has been filed to stop the implementation of the revised vocational rehabilitation rules, (Chapter 388-892 WAC), *Rehabilitation Services Accreditation System, Inc. v. Braddock*, Thurston County Superior Court. The petitioner's request for an injunction was denied but the litigation will continue on an issue regarding the rule adoption process.

Adverse Effects

None of the agencies reported that the significant legislative rule development requirements had adverse effects on their ability to fulfill their missions.

However, OIC, DOR, DOH, DSHS, and DNR noted that the requirements did impact the amount of staff time necessary to fulfill the requirements. A number also noted that the requirements at times delayed the implementation of new programs or requirements. DNR noted that the additional requirements have discouraged rulemaking by increasing the complexity, time constraints, and overall costs of rulemaking.

Rule Acceptability

DOE reported that because of the documentation required for the significant legislative rulemaking process, members of the public are better able to understand why the department made the decisions it did on the issues in the rule.

Several of the agencies reported that their increased public participation and stakeholder involvement had an impact on rule acceptability, but noted that this was a result of the agency's outreach efforts unrelated to the requirements of RCW 34.05.328.

Stakeholder Comments

DOE reported that stakeholders have reported both positive and negative impacts of the significant legislative rule process. DOH reported that it met with stakeholders in 2002 to determine whether it should seek an exemption from some of the requirements of RCW 34.05.328 for non-controversial health profession significant rules, but the agency received mixed messages from the stakeholders and ultimately decided not to pursue legislation.

Some agencies (DSHS, DOE) reported that stakeholders praised the increased public access to the rulemaking process.

OFM solicited direct feedback from rule stakeholders. One response was received, from the Independent Business Association (IBA). It noted that most agencies tried to comply with ESHB 1010, but thought that most failed to capture the spirit of the legislation. In particular, IBA noted that agencies did not generally make cost-benefit and implementation information available prior to the end of the rulemaking process, when it might be more useful to stakeholders. This has changed with the 2003 enactment of Chapter 165 (ESB 5252), which requires draft cost-benefit analysis to be available when the proposed rule is filed.

Appendices

Text of RCW 34.05.328 Significant legislative rules

Department of Ecology

Department of Health

Office of the Insurance Commissioner

Department of Labor and Industries

Department of Natural Resources/Forest Practices Board

Department of Revenue

Department of Social and Health Services

Independent Business Association

APPENDIX A

RCW 34.05.328

Significant legislative rules, other selected rules.

(1) Before adopting a rule described in subsection (5) of this section, an agency shall:

(a) Clearly state in detail the general goals and specific objectives of the statute that the rule implements;

(b) Determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection, and analyze alternatives to rule making and the consequences of not adopting the rule;

(c) Provide notification in the notice of proposed rule making under RCW 34.05.320 that a preliminary cost-benefit analysis is available. The preliminary cost-benefit analysis must fulfill the requirements of the cost-benefit analysis under (d) of this subsection. If the agency files a supplemental notice under RCW 34.05.340, the supplemental notice shall include notification that a revised preliminary cost-benefit analysis is available. A final cost-benefit analysis shall be available when the rule is adopted under RCW 34.05.360;

(d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;

(e) Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection;

(f) Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law;

(g) Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law;

(h) Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:

(i) A state statute that explicitly allows the agency to differ from federal standards; or

(ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection; and

(i) Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

(2) In making its determinations pursuant to subsection (1)(b) through (h) of this section, the agency shall place in the rule-making file documentation of sufficient quantity and quality so as to persuade a reasonable person that the determinations are justified.

(3) Before adopting rules described in subsection (5) of this section, an agency shall place in the rule-making file a rule implementation plan for rules filed under each adopting order. The plan shall describe how the agency intends to:

(a) Implement and enforce the rule, including a description of the resources the agency intends to use;

(b) Inform and educate affected persons about the rule;

(c) Promote and assist voluntary compliance; and

(d) Evaluate whether the rule achieves the purpose for which it was adopted, including, to the maximum extent practicable, the use of interim milestones to assess progress and the use of objectively measurable outcomes.

(4) After adopting a rule described in subsection (5) of this section regulating the same activity or subject matter as another provision of federal or state law, an agency shall do all of the following:

(a) Provide to the *business assistance center a list citing by reference the other federal and state laws that regulate the same activity or subject matter;

(b) Coordinate implementation and enforcement of the rule with the other federal and state entities regulating the same activity or subject matter by making every effort to do one or more of the following:

(i) Deferring to the other entity;

(ii) Designating a lead agency; or

(iii) Entering into an agreement with the other entities specifying how the agency and entities will coordinate implementation and enforcement.

If the agency is unable to comply with this subsection (4)(b), the agency shall report to the legislature pursuant to (c) of this subsection;

(c) Report to the joint administrative rules review committee:

(i) The existence of any overlap or duplication of other federal or state laws, any differences from federal law, and any known overlap, duplication, or conflict with local laws; and

(ii) Make recommendations for any legislation that may be necessary to eliminate or mitigate any adverse effects of such overlap, duplication, or difference.

(5)(a) Except as provided in (b) of this subsection, this section applies to:

(i) Significant legislative rules of the departments of ecology, labor and industries, health, revenue, social and health services, and natural resources, the employment security department, the forest practices board, the office of the insurance commissioner, and to the legislative rules of the department of fish and wildlife implementing chapter 77.55 RCW; and

(ii) Any rule of any agency, if this section is voluntarily made applicable to the rule by the agency,

or is made applicable to the rule by a majority vote of the joint administrative rules review committee within forty-five days of receiving the notice of proposed rule making under RCW 34.05.320.

(b) This section does not apply to:

(i) Emergency rules adopted under RCW 34.05.350;

(ii) Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party;

(iii) Rules adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule;

(iv) Rules that only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;

(v) Rules the content of which is explicitly and specifically dictated by statute;

(vi) Rules that set or adjust fees or rates pursuant to legislative standards; or

(vii) Rules of the department of social and health services relating only to client medical or financial eligibility and rules concerning liability for care of dependents.

(c) For purposes of this subsection:

(i) A "procedural rule" is a rule that adopts, amends, or repeals (A) any procedure, practice, or requirement relating to any agency hearings; (B) any filing or related process requirement for making application to an agency for a license or permit; or (C) any policy statement pertaining to the consistent internal operations of an agency.

(ii) An "interpretive rule" is a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers.

(iii) A "significant legislative rule" is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.

(d) In the notice of proposed rule making under RCW 34.05.320, an agency shall state whether this section applies to the proposed rule pursuant to (a)(i) of this subsection, or if the agency will apply this section voluntarily.

(6) By January 31, 1996, and by January 31st of each even-numbered year thereafter, the office of financial management, after consulting with state agencies, counties, and cities, and business, labor, and environmental organizations, shall report to the governor and the legislature regarding the effects of this section on the regulatory system in this state. The report shall document:

(a) The rules proposed to which this section applied and to the extent possible, how compliance with this section affected the substance of the rule, if any, that the agency ultimately adopted;

(b) The costs incurred by state agencies in complying with this section;

(c) Any legal action maintained based upon the alleged failure of any agency to comply with this section, the costs to the state of such action, and the result;

(d) The extent to which this section has adversely affected the capacity of agencies to fulfill their legislatively prescribed mission;

(e) The extent to which this section has improved the acceptability of state rules to those regulated; and

(f) Any other information considered by the office of financial management to be useful in evaluating the effect of this section.

[2003 c 165 § 2; 2003 c 39 § 13; 1997 c 430 § 1; 1995 c 403 § 201.]

NOTES:

Reviser's note: *(1) The business assistance center and its powers and duties were terminated June 30, 1995. RCW 43.31.083, 43.31.085, 43.31.087, and 43.31.089 were repealed by 1993 c 280 § 81, effective June 30, 1996.

(2) This section was amended by 2003 c 39 § 13 and by 2003 c 165 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Findings -- Short title -- Intent -- 1995 c 403: "(1) The legislature finds that:

(a) One of its fundamental responsibilities, to the benefit of all the citizens of the state, is the protection of public health and safety, including health and safety in the workplace, and the preservation of the extraordinary natural environment with which Washington is endowed;

(b) Essential to this mission is the delegation of authority to state agencies to implement the policies established by the legislature; and that the adoption of administrative rules by these agencies helps assure that these policies are clearly understood, fairly applied, and uniformly enforced;

(c) Despite its importance, Washington's regulatory system must not impose excessive, unreasonable, or unnecessary obligations; to do so serves only to discredit government, makes enforcement of essential regulations more difficult, and detrimentally affects the economy of the state and the well-being of our citizens.

(2) The legislature therefore enacts chapter 403, Laws of 1995, to be known as the regulatory reform act of 1995, to ensure that the citizens and environment of this state receive the highest level of protection, in an effective and efficient manner, without stifling legitimate activities and responsible economic growth. To that end, it is the intent of the legislature, in the adoption of chapter 403, Laws of 1995, that:

(a) Unless otherwise authorized, substantial policy decisions affecting the public be made by those directly accountable to the public, namely the legislature, and that state agencies not use their administrative authority to create or amend regulatory programs;

(b) When an agency is authorized to adopt rules imposing obligations on the public, that it do so responsibly: The rules it adopts should be justified and reasonable, with the agency having determined, based on common sense criteria established by the legislature, that the obligations imposed are truly in the public interest;

(c) Governments at all levels better coordinate their regulatory efforts to avoid confusing and

frustrating the public with overlapping or contradictory requirements;

(d) The public respect the process whereby administrative rules are adopted, whether or not they agree with the result: Members of the public affected by administrative rules must have the opportunity for a meaningful role in their development; the bases for agency action must be legitimate and clearly articulated;

(e) Members of the public have adequate opportunity to challenge administrative rules with which they have legitimate concerns through meaningful review of the rule by the executive, the legislature, and the judiciary. While it is the intent of the legislature that upon judicial review of a rule, a court should not substitute its judgment for that of an administrative agency, the court should determine whether the agency decision making was rigorous and deliberative; whether the agency reached its result through a process of reason; and whether the agency took a hard look at the rule before its adoption;

(f) In order to achieve greater compliance with administrative rules at less cost, that a cooperative partnership exist between agencies and regulated parties that emphasizes education and assistance before the imposition of penalties; and

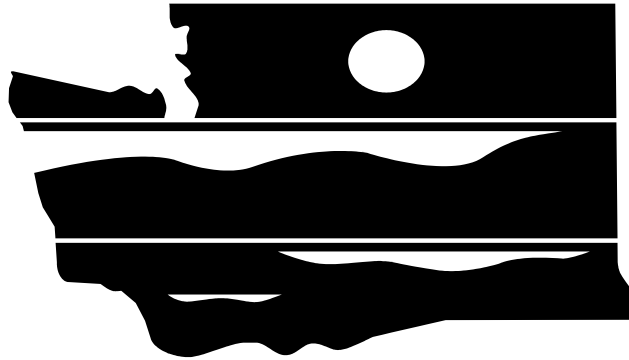
(g) Workplace safety and health in this state not be diminished, whether provided by constitution, by statute, or by rule." [1995 c 403 § 1.]

Application -- 1995 c 403 §§ 201, 301-305, 401-405, and 801: "Sections 201, 301 through 305, 401 through 405, and 801 of this act shall apply to all rule making for which a statement of proposed rule making under RCW 34.05.320 is filed after July 23, 1995." [1995 c 403 § 1102.]

Part headings not law -- Severability -- 1995 c 403: See RCW 43.05.903 and 43.05.904.

Expedited adoption: RCW 34.05.353.

APPENDIX B-1



WASHINGTON STATE
DEPARTMENT OF
E C O L O G Y

Report on Impacts of Significant Legislative Rule Making

Prepared by:
Washington State Department of Ecology
Office of Intergovernmental Relations
Rules Unit

November 2003

Introduction

Revised Code of Washington (RCW) 34.05.328(6) requires OFM to report to the Governor and the Legislature in January of each even-numbered year. The report must address how agencies are implementing significant legislative rule-making requirements as defined in chapter 34.05 RCW.

This report addresses the requirements of RCW 34.05.328(6) and how they relate to the Washington State Department of Ecology (Ecology). The report includes the following:

- A list of rules Ecology has adopted under significant legislative rule-making requirements (RCW 34.05.328) since January 1, 2002, and how compliance with these requirements affected the content of the rules adopted.
- A summary of additional costs associated with the more intensive rule-making requirements.
- A description of legal actions against Ecology for failure to comply with RCW 34.05.328.
- The extent to which significant legislative rule-making requirements have adversely impacted Ecology's ability to fulfill its mission.
- Descriptions of any decrease or increase in the acceptability by the regulated community of rules adopted under the significant legislative rule-making requirements.
- A summary of comments from stakeholders on the impacts of the significant legislative rule-making requirements.

Rules Adopted Under Significant Legislative Rule-making Requirements

The following seven adoptions were completed by Ecology between January 2002 and November of 2003.

- Motor Vehicle Emission Inspection, Chapter 173-422 WAC, Filed 6/3/2002
- Accreditation of Environmental Laboratories, Chapter 173-50 WAC Filed 10/1/2002
- Dangerous Waste, Chapter 173-303 WAC, Filed 3/13/2003
- Underground Artificial Storage and Recovery, Chapter 173-157 WAC, Filed 1/15/2003
- Solid Waste Handling Standards, Chapter 173-350 WAC, Filed 1/10/2003
- Water Quality Standards for Surface waters of the State of Washington, Chapter 173-201A WAC, Filed 7/1/2003
- State Environmental Policy Act, Chapter 197-11 WAC, Filed 8/1/2003

The following rules are *expected* to be adopted in December of 2003:

- State Master Program Approval/Amendment Procedures and Shoreline Master Program Guidelines., Chapter 173-26 WAC.
- Solid Waste Incinerator Facilities, Chapter 173-434 WAC

It is difficult to say if the requirements under 328 directly affected the substance of the above mentioned rules however, Ecology has found that compliance with this section is beneficial to the rule making process. For each of the above mentioned rules, application of the section 328 requirements affected the development of the rule in each of the following ways: it enhanced the decision making process; increased information sharing with the public; and created a shared framework that became the basis for dialogue between Ecology and interested parties about what should be in the content of the final rule adoption.

Enhanced Decision Making:

As a result of the 328 requirements staff are more thoughtful and deliberate when making decisions related to rule-making. In making the determinations required under section 328, Ecology formally documents decisions related to the rule content. This documentation provides Ecology with a paper trail allowing them to record why certain content was, or was not included in the final rule adoption. Further, the 328 requirements mandate that Ecology must also

examine economics when making decisions related to the rule-making. These tools provided Ecology with additional information that was used, in combination with relevant science, in evaluating draft rule proposals. In the end, Ecology looks at a broader spectrum of information, documents what data was reviewed and records information that will support the final determinations made by the agency.

Increased Information Sharing:

In order to comply with the requirements in section 328, Ecology must write several documents to show that the “determinations” required were made and demonstrate what information supports that determination. The public indicated that they appreciated having the information provided in the documents created to comply with these requirements. Interested parties have learned to expect certain documents from Ecology. To assist in information sharing, several templates have been developed to standardize how the information related to section 328 is prepared and presented to the public. Over time, interested parties have shown an increased expectation for the documents and more awareness of the types of information they contain. Often interested parties will use this information when submitting requests to Ecology to make changes in the rule.

Shared Framework for Dialogue:

Comments received on the economic analyses since January 2002 has opened up conversations between Ecology and the public about the content of the proposed rule. These conversations led to language changes that were incorporated into the final rule language. Many stakeholders indicated that they were better informed and felt that they could submit better comments to Ecology on the rule language. Further, they felt that the economic analyses helped them understand why Ecology had to include certain language in the rule over other options that were suggested. Further, Ecology appreciated receiving comments from interested parties that were more specific. It helped staff understand the nature of the public's concerns and find ways to engage in conversation related to those concerns.

Summary of Additional Costs Associated with More Intensive Rule-making

Actual costs associated with the significant legislative criteria requirements were not tracked separately from other rule-making activities. It is likely that many of the requirements would have been addressed in absence of the 1010 mandate. In most cases, additional costs were associated with the extensive economic analysis required and informing and educating those affected by the rule.

Description of any legal actions against Ecology for failure to comply with RCW 34.05.328, costs of such actions, and the status or outcome of the action.

There was a lawsuit brought by the Association of Washington Business and other groups directed against the 2000 Shoreline Management Act guidelines. The lawsuit involved a complex hearing at the Shoreline Hearings Board.

The costs of that litigation directly involved approximately .25 FTE of attorney time over the course of a year, spread out among several Assistant Attorneys General. An indirect cost of that litigation was that the SMA guideline rules of 2000 spent a year in mediation and negotiation with the litigants. The cost for mediators and the hundreds of hours of staff time were not tracked separately.

The outcome of this negotiated settlement resulted in another set of proposed Shoreline Management Guidelines. Since the litigants had agreed in principal with the new proposed changes, the agency did not experience the tremendous outpouring of public sentiment experienced with the previous SMA rule adoption.

Adverse effects. The extent to which significant legislative rule-making requirements have adversely affected the capacity of Ecology to fulfill its legislatively prescribed mission.

The significant legislative requirements do add cost and time to the rule-making process. However, these requirements do not adversely affect the capacity of Ecology to fulfill its legislatively prescribed mission. Often times, varying interest groups involved in the public process will focus on aspects of the significant legislative analyses and use these to lobby Ecology to make changes in the rule language that is being proposed for adoption. This too adds to the time necessary to complete a rule making activity, although it does result in more interaction between Ecology and those interested parties.

Rule acceptability. Descriptions of any measurable increase or decrease in the acceptability by the regulated community of rules adopted under these requirements.

As a result of the analyses required under section 328 members of the public are provided with more details about information used for decision making in the rule-making process. This assists interest groups in understanding why Ecology has drafted the rule the way in which it has. In several cases, stakeholders have admitted that they may not like what they see in the rule, but, as a result of reading the significant legislative documentation, they understand why Ecology made the decision to write the rule in the way that they had chosen.

Stakeholder comments. Comments from counties, cities, businesses, labor, and environmental organizations on the impacts significant legislative rule-making requirements.

Depending on the content of the rule, and the parties affected by the proposed rule content, stakeholders have expressed both positive and negative impacts of the significant legislative rule-making requirements.

Not all of the procedural requirements are of a primary concern to the regulated community. Often times they do not understand the need to expend resources for the task nor do they appreciate the delays that result in complying with section 328. It is not known whether the delay in rule-adoption was an equitable trade for the improved quality of the rule resulting from the rule-making requirements.

On the other hand, some interested parties indicate that they appreciate the additional information that is offered as a result of documents prepared to meet the 328 requirements. They indicate that they can better understand why Ecology is making the decisions they are making, and feel better prepared to offer comments to Ecology about the rule making.

APPENDIX B-2

Introduction

In 1995, the legislature made substantial changes to the Administrative Procedure Act, Chapter 34.05 RCW. Perhaps the most important change was the addition of certain tasks agencies must complete when adopting significant legislative rules. These tasks include demonstrations that probable benefits exceed probable costs, and that the rule minimizes the regulatory burden. This requirement applies only to the departments of health, labor and industries, ecology, revenue, social and health services, natural resources, employment security, the insurance commissioner, fish and wildlife and the forest practices board.

This report details the impact of RCW 34.05.328, significant legislative rules, on Title 246 of the Washington Administrative Code (WAC). This report includes the significant rules adopted since December 2001, by the Department of Health, State Board of Health and the health professional boards and commissions, which are all located within Title 246 of the Washington Administrative Code (WAC), and implemented by the department. The report identifies significant rules adopted since 2001, cost of these rules, adverse effects of significant analysis, rule acceptability, and stakeholder comments regarding significant rules.

Table 1 lists the significant rules adopted since December 2001. The table provides the chapter number and title, indicates the date of adoption, and provides the cost of developing the rule.

Table 1-- Significant Rules—December 1999 to Present

WAC Chapter	Description	Adopted By	Date Adopted	Rule Cost
246-100	AIDS/HIV Counseling and Testing	SBOH	June 2002	\$17,548
246-100, 246-101	Emergency Powers of Local Health Officers	SBOH	September 2002	\$27,954
246-145	Electrology and Tattooing	DOH	May 2002	\$7,542
246-205	Decontamination of Illegal Drug Sites	Jointly adopted: SBOH/DOH	December 2002	\$160,856
246-310	Certificate of Need Methodology	DOH	March 2003	\$14,957
246-327, 246-331	Home Health, Hospice and Home Care Licensing	DOH	August 2002	\$220,535
246-491	Vital Records—Certificates	SBOH	October 2002	\$90,132
246-562	J1 Physician Visa Waivers	DOH	August 2002	\$1,048
246-650	Newborn Screening	SBOH	November 2002	\$114,583
246-680	Prenatal Screening	SBOH	May 2003	\$13,751
246-811	Continuing Competency for Chemical Dependency Professionals	DOH	March 2002	\$20,999
246-814	Access to Dental Care	DOH	October 2002	\$14,204

WAC Chapter	Description	Adopted By	Date Adopted	Rule Cost
246-826	Hemodialysis Technician Credential	DOH	March 2002	\$6,255
246-828-020	Hearing and Speech Examinations	Board of Hearing and Speech	October 2003	\$2,118
246-830	Animal Therapy	Veterinary Board	May 2003	\$13,314
246-840	Nursing Practice and Standards	Nursing Quality Assurance Commission	March 2002	\$9,847
246-840	Nurse Delegation in Community Long-Term Settings	Nursing Quality Assurance Commission	December 2001	\$7,717
246-843	Nursing Home Administrators Licenses	Board of Nursing Home Administrators	November 2002	\$6,461
246-850	Licensed Orthotists and Prosthetists	DOH	August 2003	\$1,190
246-887	Non-narcotic Stimulants	Board of Pharmacy	January 2003	\$1,205
246-889	Restricting the Sale of Ephedrine and Pseudoephedrine	Board of Pharmacy	June 2003	\$3,113
246-926-100	Radiologic Technologists	DOH	May 2003	\$1,893
246-935-040 thru 060	Veterinary Technicians	Veterinary Board	January 2002	\$1,206
246-976	EMS Instructor	DOH	June 2002	\$20,202
246-976	Trauma Registry	DOH	December 2001	\$15,675
246-976	EMS Education Requirements	DOH	June 2002	\$10,655
246-976	EMS and Trauma Trust Account	DOH	January 2002	\$4676
Total costs for significant rule development				\$798,981

Since January 2001, the department spent almost \$800,000 in rule development for significant rules. Of this amount, four rule revision projects account for \$586,106, over 60 percent of the entire cost of significant rule making during this time. The average cost of developing significant and non-significant rules (excluding rules developed through an expedited process) is \$30,449 and \$15,433, respectively. This means significant rule development is substantially costlier than development of non-significant rules.

The department estimates the cost for rule development based on program staff time, public meetings, printing costs, postage costs and other expenses, including the cost of conducting the significant legislative rule analysis. The department's experience is that significant rules require

a much higher level of stakeholder involvement and public meetings than non-significant rules. Stakeholder involvement in rule development is a core value in agency rule development. Although stakeholder involvement through surveys, mailings, and public meetings drive up the costs of rulemaking, the department has found that these efforts increase rule acceptability.

Legal Actions

There have been no legal actions against department for failure to comply with RCW 34.05.328.

Adverse Effects

There are a few adverse effects of significant rulemaking. The primary adverse effect is the length of time significant rule development requires. On average, it takes the department 18 months to develop non-significant rules. In contrast, the average time to develop a significant rule is approximately 21 months. In some cases, significant rule development can take over 2 years.¹ The length of time it takes to adopt significant rules is frustrating for both staff and stakeholders. The length of a rule development process depends on the type of significant rule under development.

Department of Health's experience indicates that there are two types of significant rules. One type is relatively straightforward, non-controversial rules. Examples of this type of rule include eliminating a state law exam for a health profession or changing existing continuing education requirements. The significant rule analysis has no effect on the content of these rules. These rules are typically less controversial and take less time because the regulated parties support and frequently request these types of changes. Stakeholders have expressed frustration about the requirement for significant analyses for these types of rules.

The second type of significant rule is the complex significant analysis. The complexity of an analysis may reflect the difficulty to obtain data that sufficiently supports certain standards. Examples of data that are often difficult to obtain include the degree to which a standard alters public behavior or the public health risk or benefit associated with a certain standard, such as determining the cleanup standards for illegal drug labs. Data collection is a major component of significant analysis. If data are clear and readily available, the analysis is easier to conduct. If data are not available, the department may need to devote staff and resources to conduct the research necessary. The time and resources needed complete the analysis can quickly increase the cost of a rule and delay its adoption and implementation.

There are occasions when the department is unable to quantify the benefits of the rule because a quantitative estimate requires information that the department does not have and is unable to obtain without significant and expensive studies. In these situations, the department may rely on qualitative measures to estimate the benefits of a rule². An example of a rule that required the department to rely on qualitative data was the rule that established an endorsement for massage practitioners to offer animal massage.

¹ For the purpose of this report, the length of rulemaking is based on the period between the filing of a CR-101, statement of inquiry and the filing of a CR-103 order of adoption. This period does not reflect the staff research and public outreach that may occur prior to the filing of the CR-101.

² RCW 34.05.328 allows agencies to use qualitative as well as quantitative analyses.

Rule Acceptability

The department has no data to show an increase or decrease in the acceptability of rules. It has been the department's experience that the type and level of communication with stakeholders improves the acceptability far more than the analytical requirements of RCW 34.05.328.

Stakeholder Comments

In 2002, the department met with stakeholders to determine whether it was feasible to seek an exemption from some of the analytical requirements in RCW 34.05.328, and chapter 19.85 RCW. The department focused its inquiry on non-controversial, health profession significant rules, and rule changes requiring a Small Business Economic Impact Statement. The department received mixed messages from regulated parties. Some of the messages the department received were:

- The significant analysis should only be required for rules that had an adverse effect on the people regulated by the rule;
- The analytical requirements are just another delay in the process;
- Sometimes, the process should take longer.

The department elected not to pursue request legislation that would reduce the analytical requirements due to the lack of consensus among the health professions.

Other Information

This is the fourth report that the agency has submitted under RCW 34.05.328(6) since 1995. During that time, the department's rulemaking has changed dramatically. When the 1995 Regulatory Reform Act passed, the department had only one full-time employee devoted to rulemaking. The department now has 11 full time employees, either partially or entirely devoted to rulemaking. In ensuing years, the department reworked its rule development procedures, trained agency staff, and stepped up its work with stakeholders. At this time, the department's focus is on refining the process, improving coordination and communication with regulated parties and regulatory agencies, and enhancing the agency's rule tracking and reporting system.

APPENDIX B-3

***Report on Impacts of ESHB 1010 on the
Office of the Insurance Commissioner***

**Submitted by
Jon Hedegard, Rules Coordinator**

1. List of rules adopted under RCW 34.05.328 since 1/1/02 and how compliance with these requirements affected the substance of the rule, if any, as finally adopted.

The Office of the Insurance Commissioner considered all rules adopted since 1/1/2002 to be “significant legislative rules” for rule-making purposes. The requirements of RCW 34.05.328 were met in every rule-making except when those rule-making requirements were exempted by the use of the expedited rule-making process.

The following permanent rules have been adopted since January 1, 2002:

R Number	Name of rule	New	Amended	Repealed
2002-06	Total Loss and repair	16 new sections 284-30-3901 consecutively through 284-30-3916	1 amended section 284-30-390	
2003-01	Network reporting		1 amended section 284-43-220	
2002-04	Pharmacy cards	1 new section 284-43-323		
2001-15	WSHIP	1 new section 284-91-001		8 repealed sections 284-91-010 284-91-020 284-91-025 284-91-027 284-91-030 284-91-040 284-91-050 284-91-060
2002-09	Special Liability reports		1 amended section 284-07-010	
2001-10	USL&H		4 amended sections 284-22-020 284-22-050 284-22-060 284-22-080	
2002-08	Specialty producer licenses	10 new sections 284-17A-010 through 100 consecutively by 10s		
2002-07	Electronic filing		6 amended sections 284-07-050 284-07-060 284-07-070 284-07-100 284-07-110 284-07-130	

2001-08	Holding Company act for HCSCs and HMOs	21 new sections. New Chapter 284-18A-300 through 440. 284-18A-910 through 950. Both are consecutively by 010.		
2001-11	Use of credit information	12 new sections. New Chapter 284-24A-001 through 284-24A-065		
2001-12	Agent exemption		1 amendatory 284-04-120	
TOTAL		61 new sections	14 Amendatory	8 Repealed

2. Summary of the costs associated with the more intensive rule-making requirements

The rules unit is a component of the Policy Division. The rules unit consists of two people, an attorney and a staff person who administers the procedural aspects of rule making. Members of the Policy Division work with other OIC staffers to draft the proposed and final text. An economist was hired by the Policy Division to conduct the economic analyses.

Staff time increased significantly compared to the time necessary for rule making prior to ESHB 1010. Mailing costs also increased significantly after ESHB 1010 but have held fairly steady over the last several years. Costs of a rule-making can vary significantly depending on the length and complexity of the rule, number of staffers involved and the amount of their time necessary to develop the rule, and mailing costs. There are no “average rule-makings” but typical costs can run \$20,000-40,000. The agency utilizes expedited rule-making to achieve savings when possible. The agency reduces costs while increasing access by utilization of electronic distribution. The agency currently uses a listserv to e-mail rule-making information to interested parties. Over time, the agency hopes to significantly reduce hard copy mailings and their associated costs.

3. Description of legal actions for failure to comply with RCW 34.05.328, costs, and results of the actions

No legal action has been undertaken against the agency for failure to comply with RCW 34.05.328.

4. Adverse Affects. The extent of which significant legislative rule-making requirements have adversely affected the capacity of the agency to fulfill its legislative mission

The requirements had several major impacts on rule-making at the Office of the Insurance Commissioner.

First, the requirements significantly increased the staff time and costs associated with rule-making. The increase in staff time was primarily for increased duties for economists and attorneys.

Second, the requirements have slowed the agency's response to changing circumstances. The amount of time that is required by the significant legislative rule-making processes can hinder the agency's ability to quickly address or respond to an issue. The requirements for significant legislative rule-making can slow the time-lines of rule-making by weeks or months. Even in areas where there is agreement on the rule from all parties, the processes take significantly longer to complete.

Third, the increased amounts of staff time spent on rule-making processes limit the number of processes that can be undertaken at one time. Since the rule-making processes are more complex and longer, fewer issues can be addressed. While Commissioner Kreidler has rededicated agency efforts on regulatory reform, the rule-making processes limit the number of initiatives the agency can undertake.

5. Rule acceptability

The agency has detected no change at all in the attitudes of the regulated community with regards to the acceptability of our rules that can be attributed to the APA processes. Commissioner Kreidler puts a high priority on the accessibility of all interested parties to the OIC rule-making process. Commissioner Kreidler believes that interested parties participating in a dialogue can lead to improved rules and better compliance. The agency increased efforts to engage industry and interested parties in an exchange of ideas under Commissioner Kreidler. The stakeholder work by the OIC goes far beyond what is mandated by the APA. These increased OIC efforts are applauded by industry. Industry believes that Commissioner Kreidler listens to their concerns though he may not agree. This has increased the acceptability of OIC rules, not the APA processes. If the industry believes that the dialogue is only to satisfy an APA requirement, there is no increase in their trust of the agency or in the acceptability of the rule. Ultimately, the acceptability of a rule depends on the text of the rule and the perceived fairness of the agency not the process required by the APA.

6. Stakeholder comments

Some aspects of the rule-making process can confuse stakeholders. Some stakeholders do not understand what a CR-101 is or why they have received it. A common misunderstanding is the belief that the agency is farther along in rule-making than it is. Stakeholders who receive a CR-101 or see it on the website often call or write asking for finished text of the regulation when the agency is just beginning to discuss concepts. Generally, at that point, it is not known when text will be completed or when the rule-making hearing will be scheduled. All interested parties are encouraged to comment in writing at the CR-101 stage and at any future time throughout the rule-making. Another problem is that when a rule is at the CR-102 stage, stakeholders often believe that the rule is adopted. The CR-105 leads some recipients to believe that they must respond or take some action, as if it were some sort of a citation.

Stakeholders can be confused by economic analysis process. The Small Business Economic Impact Statement (SBEIS) addresses the costs and impacts of the rules upon those to be regulated by a proposed rule. Interested persons often want their economic situations taken into account, whether or not they are directly regulated by the OIC. They often ask if we look at all possible downstream costs that could affect them. While the OIC considers all comments and known impacts, it would be impossible to ascertain all potential downstream costs on all possible parties. That is not achievable, nor is it the purpose of the SBEIS.

APPENDIX B-4

**DEPARTMENT OF LABOR & INDUSTRIES
REPORT IMPACTS OF ESHB 1010 -- SIGNIFICANT LEGISLATIVE
RULEMAKING**

1. List of the rules L&I has adopted under significant legislative rulemaking requirements (RCW 34.05.328) since January 1, 2002

- **Vocational Rehabilitation**

Adopted May 12, 2003, WSR # 03-11-009

In June of 2001, a petition to amend/ repeal chapter 296-19A WAC, Vocational Rehabilitation was submitted to JARRC. JARRC reviewed the petition and determined that the department had not provided an opportunity for meaningful input by department employees during the 1999-2000 rulemaking. JARRC recommended that the department review the rules and re-open for the rules for further public input. The department sought input from the public and its employees. As a result, the rulemaking was initiated.

This rulemaking amended chapter 296-19A WAC, clarified the department's expectation relating to reporting, billing and audit requirements as well as technical changes. In addition, the rulemaking allowed providers registered with the department prior to December 1, 2000, an additional four years in which to satisfy the qualification requirements of WAC 296-19A-210.

- **Railroad Clearances**

Adopted August 21, 2002, WSR # 02-17-106

The Railroad Clearances rule was rewritten and reorganized for clarity and ease of use for employers and employees. The Railroad rule was repealed from chapter 296-28 WAC and replaced in new chapter 296-860 WAC. Additional requirements were added to this rule to make it at least as effective as that enforced by the Utilities Transportation Commission.

2. Summary of additional costs

The significant legislative rulemaking requirement of RCW 34.05.328 imposes additional costs to the agency in terms of dollars and staff. This section required a formal cost-benefit analysis, in addition to a small business economic impact analysis. As a result, the agency has required additional staff time of its economists and assistant attorneys general to develop and review cost-benefit analyses.

3. Description of any legal actions

- **Ergonomics**

The Supreme Court of the State of Washington accepted for review *Washington Employers Concerned About Regulating Ergonomics, et al., v. Dep't of Labor and Indus.*, Case No. 4 73020-2, concerning L&I's ergonomic rule. Oral argument was heard on May 22, 2003. No decision has been issued yet. As the briefs are voluminous, they are not attached, but are available upon request or at: <http://www.lni.wa.gov/wisha/ergo/>.

- **Cholinesterase Monitoring**

L&I initiated rule making at the direction of the Washington State Supreme Court following a lawsuit by farm workers who were exposed to the hazards posed by organophosphate and N-methyl-carbamate pesticides. *See Rios v. Dep't of Labor and Indus.*, 145 Wn.2d 483, 39 P.3d 961 (2002). The proposed rule would apply to all agriculture employers and workers covered by the WISHA Safety Standards for Agriculture, chapter 296-307 WAC, and the pesticide Worker Protection Standard, WAC 296-307-107.

4. Adverse effects

The significant legislative rulemaking requirements did not adversely affect the capacity of the agency to fulfill its legislatively prescribed mission.

5. Rule acceptability

There have been no detectable changes in acceptability of the agency's rules by the regulated community based solely on RCW 34.05.328.

6. Stakeholder comments

No stakeholder comments were received regarding the significant legislative rulemaking requirements.

7. Other relevant information

None.

APPENDIX B-5

December 9, 2003

Shellie Burnham
Governor's Executive Policy Office
PO Box 43113
Olympia, WA 98504-3113

SUBJECT: ESHB 1010 Significant Rulemaking Report

Dear Ms. Burnham:

The following information was requested by the Office of Financial Management regarding significant legislative rulemaking since January 1, 2002. This memo contains information for both the Department of Natural Resources and the Forest Practices Board.

1. A list of the rules your agency has adopted under significant legislative rulemaking requirements (RCW 34.05.328) since January 1, 2002, and how compliance with these requirements affected the substance of the rule, if any, as finally adopted. A brief descriptive title for each rule will be sufficient for the listing.

- SEPA Guidance for Wildlife Conservation Agreements – clarification for SEPA guidance for forest practices consistent with a Wildlife Conservation Agreement.

-Residential use of state-owned aquatic lands.

- Compliance with the significant legislative rulemaking requirements did not affect the substance of the rules.

2. A summary of additional costs associated with the more intensive rulemaking requirements for significant legislative rules.

- Additional costs are associated with staff time in planning and implementing the requirements under 34.05.328.

3. Description of any legal actions against your agency for failure to comply with RCW 34.05.328, costs of such actions, and the status or outcome of the action.

- No legal actions have been initiated or are pending.

4. Adverse effects. The extent to which significant legislative rulemaking requirements have adversely affected the capacity of your agency to fulfill its legislatively-prescribed mission.

- No adverse effects noted during this reporting period.

5. Rule acceptability. Descriptions of any measurable increase or decrease in the acceptability by the regulated community of rules adopted under these requirements.

- The rulemaking process allowed the Forest Practices Board to use the negotiated rulemaking process. Acceptability of the proposed rule was determined during negotiated rulemaking process. No measurable changes for the adopted rules have been noted to date.

6. Stakeholder comments. Any comments you have received from counties, cities, businesses, labor, environmental organizations, or any other stakeholders on the impacts of significant legislative rulemaking requirements.

- No comments were received on the impacts of significant legislative rulemaking requirements.

7. Other relevant information. How has rulemaking changed in your agency since 1995, when ESHB 1010 was adopted? Do you think this has helped or hindered in fulfilling your mission?

- The additional requirements of ESHB 1010 have discouraged rulemaking by increasing the complexity, time constraints, and overall costs. ESHB 1010 has affected both DNR and Forest Practices Board rule making by creating a fiscal limitation on future rulemaking that could incur 328 expenses, because these expenses are not allotted within program budgets. Potential rule making may be suppressed by the anticipated costs of complying with these requirements, and outdated rules and related requirements may be retained as opposed to undertaking rule making to update the rules. The potential costs of contracting work to create these products significantly contributed to a decision by the Forest Practices Board not to conduct rulemaking in response to a modification to our authorizing statute, the Forest Practices Act. The programs do not employ any economists or fiscal analysts qualified to create 328 products.

Thank you for providing the Department of Natural Resources the opportunity to comment. Please contact Heather White, DNR Rules Coordinator, at 902-1408 if you have any questions.

Sincerely,

Bonnie B. Bunning, Executive Director
Policy and Administration

c: Heather White, DNR Rules Coordinator

APPENDIX B-6



STATE OF WASHINGTON
DEPARTMENT OF REVENUE
OFFICE OF THE DIRECTOR

P.O. Box 47450 • Olympia, Washington • 98504-7450 • (360) 753-5574 • FAX (360) 586-5543

November 14, 2003

TO: Shellie Burnham
Governor's Executive Policy Office

FROM: William N. Rice, Acting Director

**SUBJECT: REPORT ON IMPACTS OF ESHB 1010 – SIGNIFICANT
LEGISLATIVE RULE MAKING**

1. Significant Legislative Rules Adopted Since January 1, 2002

The Department of Revenue has adopted only one rule (issued twice each year) that we have considered a significant legislative rule since January 1, 2002. The rule is WAC 458-40-660, Timber excise tax –Stumpage value tables, which is used by timber harvesters to calculate their timber excise tax liability. The data and calculations used have been negotiated between the timber industry and the Department. There are other ways of calculating the stumpage values and this is why the Department first designated this rule a significant legislative rule in 1996. We update the cost benefit analysis each time the rule is rewritten. There have been no compliance problems with this rule.

2. Summary of Additional Costs Associated with Rulemaking Requirements

The additional costs of preparing the information required under ESHB 1010 for Rule 660 have been minimal, principally because the Department is required to routinely revise this rule. These costs were absorbed within the normal operations of the Department.

3. Description of Any Legal Actions for Failure to Comply

Litigation is pending regarding our rule-writing authority, but it is not directly tied to the significant legislative rule provision (AWB v. Dept of Revenue, Washington State Court of Appeals, No. 29793-1-II, and AWB v. Dept of Revenue, Thurston Co. Sup. Ct, Docket # 03-2-1916-7). There have been no legal actions against the Department directly related to the use or non-use of regulations associated with significant rules since January 1, 2002.

4. Adverse Effects

The majority of the Department's rules are interpretive and the regulations associated with significant legislative rules have not had an adverse affect on our ability to fulfill our legislatively prescribed mission.

5. Rule Acceptability

We cannot categorize any increase or decrease in the acceptability of our significant legislative rules by the regulated community.

6. Stakeholder Comments

As the methodology used to determine stumpage values was negotiated with the industry and county assessors, and there have been no impacts as a result of using significant legislative rule requirements, we have no stakeholder comments for the period in question.

7. Other Relevant Information

Rule making and the environment for rule making have substantially changed for the Department since 1995. Executive Order 97-02, in particular, has had a positive effect.

Changes that help the Department of Revenue fulfill its mission include:

- The Department's continuing efforts to make rule making information more accessible to the public. Examples include the use of electronic mail listservs to notify interested persons of the Department's interpretive statement and rule-making actions, from preproposal stage to adoption, and the use of the Internet to make this information available to any person.
- The Department's emphasis on eliminating unneeded rules and interpretive statements, primarily the result from EO 97-02, and consolidating information into fewer more comprehensive documents to make it easier for taxpayers and Department personnel to find relevant information.
- The filing of notices with the Code Reviser to announce the issuance or cancellation of interpretive statements provides another means of notifying the public of important information made available by the Department.
- Standard language on interpretive statements explaining that the statements are advisory for taxpayers but binding on the Department. This standard language was the result of discussions between representatives of the business community and the Department.

Changes that at times prove to be a barrier to Department of Revenue efficiently fulfilling its mission include:

- The standard rule-making process can be complex and too long of a process for some of the rules adopted by the Department. This delays the Department's ability to timely provide information to taxpayers and

Ms. Shellie Burnham

November 14, 2003

Page 3

Department employees. The Department spends a lot of time and energy on rules involving difficult issues, with the more routine rule updating suffering because of the lengthy process for even these rules and the Department's limited resources.

- The Department has historically relied upon and cited RCW 82.32.300 as rule making authority for interpretive rules in chapter 458-20 WAC (Excise Tax Rules). While the Department continues to believe this is the appropriate authority, it has begun citing both RCW 82.32.300 and 82.01.060(2) as authority for rule making on forms filed with the Code Reviser due to current litigation.

cc: Alan Lynn, Rules Policy Specialist

APPENDIX B-7



STATE OF WASHINGTON

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

P.O. Box 45010, Olympia, Washington 98504-5010

November 14, 2003

TO: Shellie Burnham
Governor's Executive Policy Office

FROM: Kathleen Brockman, Chief Administrative Officer

SUBJECT: **Impact of ESHB 1010 (Significant Legislative Rule Making)
on DSHS Rule Making**

Attached is the Department of Social and Health Services report on the impact of ESHB 1010 on DSHS rule-making for the period January 1, 2002 to September 30, 2003. An agency-wide summary is followed by detail pages for each DSHS administration or division that adopted significant legislative rules during this period.

If you have questions regarding significant legislative rule making at DSHS, please contact Brian Lindgren, the manager of our Rules and Policies Assistance Unit, at 664-6093.

Thank you.

Attachments

cc: Liz Dunbar
Jim Schnellman
Brian Lindgren

Department of Social and Health Services

Significant Legislative Rules Adopted Under ESHB 1010 (RCW 34.05.328) January 1, 2002 through September 30, 2003

Summary

Since its passage in 1995, the impact of ESHB 1010 (RCW 34.05.328) has been to require documentation of key decisions made by the Department of Social and Health Services as DSHS has proposed and adopted rules. This includes documentation that the benefits of the rule outweigh its costs and that the rule being adopted is the least burdensome alternative for those required to comply with it. In most cases, it has not increased opportunities for involvement by the public, affected businesses and local governments in the development of DSHS rules. The department seeks to involve stakeholders as part of the regular rule-making process. Other factors – the Governor’s Executive Order 97-02, internal DSHS policies, extensive training for DSHS staff – have influenced rule-making to a greater degree than the implementation of ESHB 1010.

Impacts of the significant legislative rule statute have been mainly internal to DSHS. The department has increased training for rule writers and program managers in the requirements of the statute, in how staff determine whether rules meet the definition of “significant” under the statute and in the completion of cost benefit analyses, rule implementation plans and other documentation required by the law. Staff time, copying and mailing costs related to preparing and disseminating these documents are greater than would occur without ESHB 1010. At times, the additional requirements of ESHB 1010 have delayed implementation of rules that the department believes improve the quality of life for its clients. But in general, ESHB 1010 has not adversely affected the department’s ability to fulfill its statutory mission.

From January 1, 2002 through September 30, 2003, DSHS:

- Adopted 38 rule-making orders affecting 1,219 WAC sections to which the requirements of RCW 34.05.328 applied;
- Repealed 240 WAC sections in these rule-making orders;
- Spent 14 months, on average, to develop and adopt a significant legislative rule, from filing of the CR-101 preproposal statement of inquiry to filing of the CR-103 permanent rule order. The range was 4.5 months to 48 months.

The development of these significant legislative rules typically involved public meetings, work groups, surveys, and other forms of consultation with the consumers, advocacy groups, and regulated businesses in the drafting stages prior to filing formal proposed rules. Often this consultation began before the preproposal statement of inquiry was filed, and continued after the permanent rules became effective to assure that rules are effective and appropriate.

Consumers affected by DSHS significant legislative rules have generally been supportive of the department's rule-making process, even in cases where they have disagreed with the content of the rules. Public participation has made consumers more knowledgeable about how DSHS applies the rule-making process under the Administrative Procedure Act, and DSHS' customers have shown increased desire to take part in that process. However, we believe this heightened participation is due as much to the manner in which DSHS conducts rule-making and has implemented other regulatory reform efforts as to the impact of ESHB 1010.

There is one pending legal action challenging the department's process to adopt significant legislative rules in chapter 388-78A WAC. The permanent rule, on the licensing of boarding homes serving the elderly and vulnerable adults, was filed with the Code Reviser on July 31, 2003, and a Petition for Review of Rulemaking was filed in Thurston County Superior Court on August 29, 2003.

DSHS spent three years developing the boarding home rules. In that time, the department's Aging and Disability Services Administration – Residential Care Services Division formed eight working groups comprised of affected consumers and advocates, the regulated facilities, other agencies and the state long-term care ombudsman. The work groups met 58 times and offered 206 recommendations on the content of the draft rules. At a public hearing on March 11, 2003, 19 persons testified, some opposing and some supporting the proposed rules. To facilitate more input, DSHS extended the written comment deadline an additional fifty days, and more than 400 pages of written comments were received. DSHS responded to all the issues raised in the written and hearing testimony, in some cases modifying the content of the proposed rules in the final adopted version. Responding to industry concerns, DSHS delayed implementation of the permanent boarding home rules until September 1, 2004. The adopted boarding home rules are a significant improvement over the previous version, written to reflect the current needs of both providers and residents. They also allow facilities to expand the types and levels of care that they provide. Where previously boarding homes rules and policies totaled 91 pages, the revised rules now total 81 pages. DSHS efforts lived up to both the letter and the spirit of ESHB 1010, and the adopted rules are a reflection of the department's commitment to public participation in the development of significant legislative rules.

The attached DSHS program reports provide details about the significant legislative rules adopted during this reporting period. The following DSHS programs did not adopt rules during this reporting period to which the requirements of RCW 34.05.328 applied:

- Aging and Disability Services Administration - Rates Management Division;
- Economic Services Administration - Division of Child Care and Early Learning, Community Services Division, and Division of Employment and Assistance Programs;
- Health and Rehabilitation Services Administration - Mental Health Division, and the Special Commitment Center;
- Management Services Administration

DSHS Administration and Division Reports

Children's Administration

- 1. How has rule-making has changed for Children's Administration since the adoption of the Significant Legislative Rule statute, RCW 34.05.328, in 1995?**

In compliance with the statute and regulatory reform Executive Order 97-02, Children's Administration (CA) actively involves those being regulated and other stakeholders in the rule development process. Also, CA management team is keenly aware of the importance of stakeholder participation and has involved themselves in thorough reviews of any new or amended rules.

This has increased the length of time to promulgate rules significantly. However, the overall benefit has been the increase in the involvement of those regulated and their understanding of the reasons for program rules and willingness to work collegially.

- 2. What additional costs has Children's Administration experienced related with the more intensive rule-making requirements of RCW 34.05.328?**

Most impacts have been related to implementation of E.O. 97-02. Children's Administration developed a permanent position within the Division of Program and Policy Development. The responsibilities of this position are to promulgate Washington Administrative Code and residential licensing policy as necessary for the health and safety of children in out-of-home placement. The cost to the CA is the addition of one FTE—licensing standards program manager. An additional responsibility of this position is to consult with other CA program managers on the development and adoption of WAC for those programs.

- 3. Have the significant legislative rule-making requirements of ESHB 1010 adversely affected Children's Administration ability to fulfill its legislatively mandated mission, and how?**

No.

- 4. Describe any legal actions against Children's Administration for failure to comply with RCW 34.05.328, cost of such actions, and the status or outcome of the action.**

None.

5. Has there been any measurable increase or decrease in how the regulated community accepts Children's Administration rules adopted under RCW 34.05.328?

There has been a significant increase in participation of those regulated by Children's Administration rules. The Administration takes seriously and has embraced the intent of the statute, RCW 34.05.328, and Executive Order 97-02. As well, Children's Administration licensing and program staff have taken a more active role in the process. The education of stakeholders has increased their desire and insistence in being engaged in the process.

6. List and description of significant legislative rules adopted by Children's Administration during this period:

A. New Chapter 388-145 WAC, Emergency Respite Centers

i. **Description:** Establishing minimum licensing requirements for emergency respite centers, also known as crisis nurseries, to provide care for children in crisis or who may be facing abuse or neglect; implementing recent legislation chapter 230, laws of 2001.

Adopted March 26, 2003 as WSR 03-08-026

Months to complete this rule-making: 20 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Directors of two crisis nurseries commented after the process that they were appreciative of the program manager's inclusiveness and openness to their contribution to the development of reasonable rules.

B. New Chapter 388-180 WAC, Standards for health and safety reviews at the Washington School for the Deaf.

i. **Description:** Implementing DSHS health and safety reviews of the school's residential facilities and residential-related policies as direct by 2002 legislation SHB 2568.

Adopted Jan. 24, 2003 as WSR 03-04-013

Months to complete this rule-making: 8 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

No comments were received directly by the program manager. However, comments from the school were made to staff monitoring compliance to the new rules that they felt the process had been beneficial to the operation of the school.

Aging and Disability Services Administration

Division of Developmental Disabilities

1. **How has rule-making changed for the Division of Developmental Disabilities since the adoption of the Significant Legislative Rule statute, RCW 34.05.328, in 1995?**

The Voluntary Placement Program workers who work with the clients and the supervisors who supervise the workers are now able to find answers to their questions in the WAC. They place a greater reliance on their ability to secure information independently than when they only had the manuals and program manager on which to rely.

2. **What additional costs has Division of Developmental Disabilities experienced related with the more intensive rule-making requirements of RCW 34.05.328?**

There have been no additional costs related to rule requirements.

3. **Have the significant legislative rule-making requirements adversely affected Division of Developmental Disabilities' ability to fulfill its legislatively mandated mission, and how?**

No.

4. **Describe any legal actions against the Division of Developmental Disabilities for failure to comply with RCW 34.05.328, cost of such actions, and the status or outcome of the action.**

None.

5. **Has there been any measurable increase or decrease in how the regulated community accepts the Division of Developmental Disabilities' rules adopted under RCW 34.05.328?**

There is a "cap" on the Voluntary Placement Program currently. No new individuals are allowed to enter the program. Due to the publication of the rule, the regulated community now more readily accepts the rules surrounding entry and exit criteria. The measurable evidence is quantified by the Program Manager on a quarterly basis.

6. **List and description of significant legislative rules adopted by the Division of Developmental Disabilities during this period:**

New Chapter 388-826 WAC, Voluntary placement program.

i. **Description:** Creating a new program in rule to define how a child or youth who meets the definition of developmentally disabled may be voluntarily placed by his or her family in a licensed group home or foster home.

Adopted Oct. 31, 2002 as WSR 02-22-057

Months to complete this rule-making: 48 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Comments were very positive from stakeholders.

Aging and Disability Services Administration

Home and Community Services Division

1. **How has rule-making changed for the Home and Community Services Division since the adoption of the Significant Legislative Rule statute, RCW 34.05.328, in 1995?**

Rules coordination for Home and Community Services (HCS) has become increasingly time-consuming due to the additional requirements of a cost-benefit analysis, rule implementation plan, and significant rule analysis.

2. **What additional costs has the Home and Community Services Division experienced related with the more intensive rule-making requirements of RCW 34.05.328?**

Other than additional staff time, no extra costs have been incurred by HCS.

3. **Have the significant legislative rule-making requirements adversely affected the Home and Community Services Division ability to fulfill its legislatively mandated mission, and how?**

No.

4. **Describe any legal actions against the Home and Community Services Division for failure to comply with RCW 34.05.328, cost of such actions, and the status or outcome of the action.**

None.

5. Has there been any measurable increase or decrease in how the regulated community accepts the Home and Community Services Division rules adopted under RCW 34.05.328?

There has not been a measurable increase or decrease in acceptance of the significant rules adopted. However, stakeholders are becoming increasingly knowledgeable of the rule-making process.

6. List and description of significant legislative rules adopted by the Home and Community Services Division during this period:

A. Chapter 388-15 WAC and 388-71 WAC, Home and Community Programs, Adult Day Services

i. **Description:** Repealing adult day services rules in chapter 388-15 WAC and incorporating the subject matter into chapter 388-71 WAC. The rules were adopted as result of rule-making petition submitted under RCW 34.05.330. The rule clarifies adult day services client eligibility, transfers eligibility determinations and contracting administration to area agencies on aging, and clarifies the status of adult day centers as contracted providers.

Adopted Feb. 24, 2003 as WSR 03-06-024

Months to complete this rule-making: 8 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or the program's process of involving stakeholders to develop this rule:**

Many stakeholders opposed implementation of this rule, as there were many issues regarding eligibility. However, the response to stakeholder involvement in the rule-making process was good. A stakeholder panel met with HCS staff on six occasions and provided input for rule language.

B. Chapter 388-71 WAC, Home and Community Programs – Caregiver training requirements

i. **Description:** Implementing chapter 121, Laws of 2001 on training requirements for caregivers in home and community care settings; and implementing procedures for approving training curricula and instructors.

Adopted April 30, 2002 and July 11, 2002 as WSR 02-10-117 and 02 15-064

Months to complete this rule-making: 20 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

The process of involving stakeholders in the development of this rule had a good outcome. Rule language was coordinated with a steering committee, which consisted of a legislatively set group of stakeholders.

C. Chapters 388-76, 388-110 WAC and new chapter 388-112 WAC, Caregiver training requirements

i. **Description:** Implementing chapter 121, Laws of 2001 on training requirements for caregivers in community care settings; and implementing procedures for approving training curricula and instructors.

Adopted July 11, 2002 as WSR 02-15-065 and 02-15-066

Months to complete this rule-making: 20 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Stakeholder comments were taken into consideration after the public hearing on this rule. Language was rewritten prior to adoption of this rule, based on comments from the public.

Aging and Disability Services Administration
Residential Care Services Division

- 1. How has rule-making changed for the Residential Care Services Division since the adoption of the Significant Legislative Rule statute, RCW 34.05.328, in 1995?**

The rule-making process has become lengthier and more detailed and thus, at times delaying the implementation date.

- 2. What additional costs has the Residential Care Services Division experienced related with the more intensive rule-making requirements of RCW 34.05.328?**

We have experienced an increase in the costs of copying and mailing notices to interested stakeholders and parties. Also, we have seen an increase in staff time and resources needed to complete the necessary documentation such as the cost benefit analysis.

- 3. Have the significant legislative rule-making requirements adversely affected the Residential Care Services Division's ability to fulfill its legislatively mandated mission, and how?**

The significant legislative rule-making requirements have at times delayed the implementation of rules that would improve the quality of life for residents in our long term care settings. A group of providers has alleged noncompliance by DSHS with the requirements of RCW 34.05.328 as a way to challenge the department's rule-making process.

- 4. Legal actions related to the Residential Care Services Division's failure to comply with RCW 34.05.328, costs of legal actions, and the outcome of the legal action:**

See 6. A. and B. below for details.

- 5. Has there been any measurable increase or decrease in how the regulated community accepts the Residential Care Services Division's rules adopted under RCW 34.05.328?**

We have seen an increase in challenges by the regulated community on our program rules.

6. List and description of significant legislative rules adopted by the Residential Care Services Division during this period:

A. Chapter 388-78A WAC, Boarding Homes.

i. **Description:** Revising the entire chapter to make boarding home rules more applicable to the needs of current residents of these facilities¹; to improve the quality of care and services for residents; to place more emphasis on assessing the needs of residents, developing negotiated service agreements, and monitoring services consistent with the agreements.

Adopted July 31, 2003 (effective Sept. 1, 2004) as WSR 03-16-047

Months to complete this rule-making: 36 months.

ii. **Legal actions related to the Residential Care Services Division's failure to comply with RCW 34.05.328, costs of legal actions, and the outcome of the legal action:**

A suit has been filed by the "Assisted Living Legal Defense Fund" challenging both the content of the rule and the rule-making process. The suit is still pending.

iii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Aging and Disability Services Administration (ADSA) began the process of obtaining public input regarding amending WAC 388-78A around March 2000 by holding meetings with a wide variety of stakeholders. The process included providers and consumers and resulted in a large degree of consensus on all major topics. Provider participation in the workgroups was consistently high and predominant.

The initial meetings were designed to identify the general problems that existed in current rules and the major topics that needed to be addressed. As a result of these first discussions, eight different work groups, composed of a variety of stakeholders, were created around the topics of:

- Provision of nursing services and health care supports
- The process of assessing residents' needs
- Boarding homes disclosing to the public the services they provide
- Administrative issues in the boarding home
- Providing care to persons with dementia

¹ Per Legislative mandates and consistent with federal anti-discrimination laws, ASDA seeks to serve Medicaid clients in community-based settings as opposed to institutionalized care in nursing homes whenever possible. As a result, many clients who previously were served in nursing homes are now served in community-based settings such as boarding homes. Thus, boarding homes are increasingly serving residents with acute care needs, such as substantial nursing care, development disabilities, mental illnesses and dementia. ASDA believes the boarding home rules should reflect the current populations in boarding homes to ensure such persons receive appropriate care and services.

- Enforcement issues
- The building and physical environment, and
- Miscellaneous issues including the basic services that should be required in a boarding home.

These eight work groups met a total of 58 times and developed 206 advisory recommendations to ADSA. These advisory recommendations served as general concepts or guiding principles for inclusion in the revision of WAC 388-78A. ADSA management team reviewed each of these recommendations and accepted the vast majority of them. Participants and the industry overall was very supportive of the process. Please note: The size of the amended rules is 81 + pages as compared to the previous total of 91 + pages including 41 pages of WACS plus 50 pages of Interim Guidelines. This does not include numerous letters to providers.

B. Chapter 388-97 WAC, Nursing Homes

i. **Description:** Repealing all sections of chapter 388-98 WAC and incorporating the subject matter into chapter 388-97 WAC to bring all nursing home rules into one chapter for easier reference.

Adopted June 27, 2002 as WSR 02-14-063

Months to complete this rule-making: 20 months.

ii. **Legal actions related to failure to comply with RCW 34.05.328, costs of legal actions, and the outcome of the legal action:**

None

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Several meetings were held to obtain stakeholders comments on the proposed rules. Stakeholders were sent notices and given drafts of the proposed rules. Also, stakeholders were given the opportunity to provide written comments throughout the entire rule-making process. There has been no major contest of these rules.

Economic Services Administration

Division of Child Support

- 1. How has rule-making has changed for the Division of Child Support since the adoption of the Significant Legislative Rule statute, RCW 34.05.328, in 1995?**

Although there have been changes to the DCS rulemaking process since 1996, these changes are not attributable to RCW 34.05.328 in particular. DCS has increased the amount of stakeholder work and public participation in its rulemaking; we meet with stakeholders (especially the legal services advocates) several times during the course of each year to discuss developments in policy; we hold public meetings to present new programs; we have found that working with stakeholders and the public during the rule development phase means that we have dealt with objections and concerns prior to the rulemaking hearing, and so there are no conflicts when the rules are adopted.

- 2. What additional costs has the Division of Child Support experienced related with the more intensive rule-making requirements of RCW 34.05.328?**

None, because we have not made specific changes that can be attributed directly to the requirements of 34.05.328.

- 3. Have the significant legislative rule-making requirements adversely affected the Division of Child Support's ability to fulfill its legislatively mandated mission, and how?**

No, see the answer to 2 above.

- 4. Legal actions related to the Division of Child Support's failure to comply with RCW 34.05.328, costs of legal actions, and the outcome of the legal action:**

None.

- 5. Has there been any measurable increase or decrease in how the regulated community accepts the Division of Child Support's rules adopted under RCW 34.05.328?**

The increase in how the regulated community accepts DCS rules are due to the changes in DCS' rulemaking process as a whole, as described in 1 above.

- 6. List and description of significant legislative rules adopted by the Division of Child Support during this period:**

Chapter 388-14A WAC, Division of Child Support rules

i. **Description:** Clarifying rules on confidentiality and disclosure of information contained in Division of Child Support records.

Adopted March 19, 2002

as WSR 02-07-091

Months to complete this rule-making: 11 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

During the development of these rules, DCS shared draft rules and met with legal services advocates, custodial parent advocates, non-custodial parent advocates, DCS staff and DSHS staff; we held user groups to make sure the language was clear and understandable. We did not receive any comments regarding the impact of the rule after the filing of the CR 102.

Health and Rehabilitation Services Administration**Division of Alcohol and Substance Abuse**

1. How has rule-making changed for the Division of Alcohol and Substance Abuse since the adoption of the Significant Legislative Rule statute, RCW 34.05.328, in 1995?

DSHS/DASA rule-making has changed little since the adoption of the Significant Legislative Rule statute. DSHS/DASA has always had a participatory style of rule-making that includes significant comment and involvement by stakeholders in its rule-making process.

2. What additional costs has the Division of Alcohol and Substance Abuse experienced related with the more intensive rule-making requirements of RCW 34.05.328?

DSHS/DASA has not experienced additional costs for rule-making as a result of RCW 34.05.328.

3. Have the significant legislative rule-making requirements adversely affected the Division of Alcohol and Substance Abuse's ability to fulfill its legislatively mandated mission, and how?

The significant legislative rule-making requirements have not adversely affected the Division of Alcohol and Substance Abuse's ability to fulfill the DSHS mission.

4. Legal actions related to Division of Alcohol and Substance Abuse's failure to comply with RCW 34.05.328, costs of legal actions, and the outcome of the legal action:

DSHS/DASA was not subject to legal actions alleging failure to comply with RCW 34.05.328, Significant Legislative Rules. DSHS/DASA was challenged on its emergency rules; however, these emergency rules are exempt from the Significant Legislative Rules statute. Emergency rules implemented changes in state and federal law for the certification of opiate substitution treatment programs. The court upheld the DSHS/DASA emergency rules.

DSHS/DASA has not been subject to a legal challenge on the permanent WAC 388-805 filed September 23, 2003.

5. Has there been any measurable increase or decrease in how the regulated community accepts the Division of Alcohol and Substance Abuse's rules adopted under RCW 34.05.328?

DSHS/DASA Management Team members received positive feedback from the majority of stakeholders about the process used to adopt revisions to WAC 388-805 under RCW 34.05.328 during 2002-2003. Stakeholders requested an opportunity to continue to work with DSHS/DASA in 2004 to ensure consistency of rule interpretation and implementation by certified chemical dependency service providers.

6. List and description of significant legislative rules adopted by the Division of Alcohol and Substance Abuse's during this period:

Chapter 388-805 WAC, Certification Requirements for Chemical Dependency Service Providers:

i. **Description:** Adopting rules establishing the level of quality and patient care standards for chemical dependency service providers seeking certification by DSHS/DASA. Rule-making in 2002-2003 also established rules for providers seeking certification as an Opiate Substitution Treatment Program (OTP); conforming rules to federal requirements; and implementing chapter 242, Laws of 2001.

Adopted Sept. 23, 2003 as WSR 03-20-020

Months to complete this rule-making: 17 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

During the rule-making process, DSHS/DASA conducted a number of stakeholder meetings to receive public comment about its rules. Stakeholder meetings include:

<u>Type of Stakeholder Meeting</u>	<u>Number of Meetings</u>
WAC Revision Committee Meeting	9

OTP Stakeholder Meeting	4
Public Discussion Meetings	4
DASA Public Hearings – Rules Review	5
Association of Washington Cities	4
Washington State Association of Counties	2
Washington State Association of Independent OP	1
Municipal/District Court Judges Association	1
Association of County Human Services	1
Department of Health – Chemical Dependency Program	1
DASA Internal Sections	9

Health and Rehabilitation Services Administration

Division of Vocational Rehabilitation

- 1. How has rule-making has changed for the Division of Vocational Rehabilitation since the adoption of the Significant Legislative Rule statute, RCW 34.05.328, in 1995?**

Increased the amount of staff time and number of steps to gain public input for the purpose of creating new rules or amending current rules.

- 2. What additional costs has the Division of Vocational Rehabilitation experienced related with the more intensive rule-making requirements of RCW 34.05.328?**

Increased cost of staff time related to obtaining public input to create or amend rules.

- 3. Have the significant legislative rule-making requirements adversely affected the Division of Vocational Rehabilitation's ability to fulfill its legislatively mandated mission, and how?**

No

4. **Legal actions related to the Division of Vocational Rehabilitation failure to comply with RCW 34.05.328, costs of legal actions, and the outcome of the legal action:**

None

5. **Has there been any measurable increase or decrease in how the regulated community accepts the Division of Vocational Rehabilitation's rules adopted under RCW 34.05.328?**

Measurement is difficult other than through the recording of comments received through the public input process. Stakeholders have offered informal anecdotal appreciation regarding the opportunity to provide input during the rule-making process.

6. **List and description of significant legislative rules adopted by the Division of Vocational Rehabilitation during this period:**

A. New Chapter 388-891 WAC, Vocational rehabilitation services for individuals with disabilities.

- i. **Description:** Repealing sections in chapter 388-890 WAC, revising the rule text to meet federal rules and statutes and state statutes; and re-adopting the rules in a new chapter.

Adopted Dec. 20, 2002 as WSR 03-02-014

Months to complete this rule-making: 13 months

- ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Stakeholders have offered informal anecdotal appreciation regarding the opportunity to provide input during the rule-making process.

B. New Chapter 388-892 WAC, Purchase of services – Selection criteria – Community rehabilitation programs

- i. **Description:** Adopting a new WAC chapter to define the process for DVR to purchase client vocational rehabilitation services through contracted community-based providers; repeal of WAC 490-500-0005

Adopted Sept. 12, 2003 as WSR 03-15-035

Months to complete this rule-making: 19 months.

- ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

DVR held over 20 open public forums in multiple locations throughout all geographic areas of the state to gain public input and also sent out multiple

draft versions of the proposed rule to a mailing list of approximately 750 stakeholders. Return input was minor.

Juvenile Rehabilitation Administration

- 1. How has rule-making changed for the Juvenile Rehabilitation Administration (JRA) since the adoption of the Significant Legislative Rule statute, RCW 34.05.328, in 1995?**

There is additional workload for program administrators to complete the rule-making process. This includes a more expansive effort to involve stakeholders throughout the process and increased training needs on various aspects of the requirements outlined in the statutory requirements.

- 2. What additional costs has the Juvenile Rehabilitation Administration experienced related with the more intensive rule-making requirements of RCW 34.05.328?**

JRA has a relatively small number of rules. The workload has been assigned as additional duties to subject experts. This includes the need for “in time” training for these program administrators. The broader regulatory reform requirements resulted in a partial FTE in Headquarters, but it can’t be solely attributed to the 1995 change. There has also been an increase in the number of rules that have been legislatively required for JRA which had a temporary fiscal impact. Again, this can’t be attributed to the 1995 law change, but the cumulative effect has resulted in FTE impact and workload redistribution.

- 3. Have the significant legislative rule-making requirements adversely affected the Juvenile Rehabilitation Administration’s ability to fulfill its legislatively mandated mission, and how?**

No.

- 4. Legal actions related to failure the Juvenile Rehabilitation Administration to comply with RCW 34.05.328, costs of legal actions, and the outcome of the legal action:**

None

5. **Has there been any measurable increase or decrease in how the regulated community accepts the Juvenile Rehabilitation Administration's rules adopted under RCW 34.05.328?**

No.

6. **List and description of significant legislative rules adopted by the Juvenile Rehabilitation Administration during this period:**

Chapter 388-730 WAC, Placement of juvenile offenders committed to the Juvenile Rehabilitation Administration

A. **Description:** Amending rules to more accurately reflect current placement options for youths in JRA programs.

Adopted Jan. 15, 2003 as WSR 03-03-070

Months to complete this rule-making: 8 months.

B. Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:

The stakeholder comments received were supportive. Stakeholder processes were used to involve interested parties before the rule process even began. This was key as the program's success depends on the ability to partner with the community entities where the pilot is being implemented.

Medical Assistance Administration

1. **How has rule-making changed for the Medical Assistance Administration since the adoption of the Significant Legislative Rule statute, RCW 34.05.328, in 1995?**

Preparing a cost benefit analysis (CBA) on our provider rules is probably the biggest impact of RCW 34.05.328 on MAA's rule-making process. It can require a significant amount of research and data collection to prepare a CBA. The requirements of the Governor's Executive Order 97-02 has had a much greater impact on rule-making within MAA.

2. What additional costs has the Medical Assistance Administration experienced related with the more intensive rule-making requirements of RCW 34.05.328?

Indirect costs, such as staff salaries, related to the time spent researching and collecting data for CBAs and completing the additional forms (significant rule analyses, rule implementation plans) required for rule-making.

3. Have the significant legislative rule-making requirements adversely affected the Medical Assistance Administration's ability to fulfill its legislatively mandated mission, and how?

No.

4. Legal actions related to the Medical Assistance Administration's failure to comply with RCW 34.05.328, costs of legal actions, and the outcome of the legal action:

None

5. Has there been any measurable increase or decrease in how the regulated community accepts the Medical Assistance Administration's rules adopted under RCW 34.05.328?

No.

6. List and description of significant legislative rules adopted by the Medical Assistance Administration during this period:

A. Chapters 388-406, 388-416, 388-418, 388-424, 388-438, 388-450 and 388-503 WAC.

i. **Description:** Revising rules to eliminate state funded medical coverage for undocumented children and for legal immigrant children and adults who are ineligible for Medicaid due their federal immigration status, as required by 2002 legislation SB 6833.

Adopted Aug. 12, 2002 as WSR 02-17-030

Months to complete this rule-making: 5 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

B. WAC 388-502-0160, Billing a Client.

ii. **Description:** Establishing a \$3 co-pay for Medicaid clients using hospital emergency facilities for non-emergency when less costly alternatives are available.

Adopted May 31, 2002 as WSR 02-12-070

Months to complete this rule-making: 6 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

C. Chapter 388-523 WAC Medical Extensions

i. **Description:** Revising the rule to establish client premiums during the second six-month period of medical extension benefits.

Adopted April 22, 2003 as WSR 02-10-018

Months to complete this rule-making: 7 months

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

D. WAC 388-530-1270, Mail order pharmacy services

ii. **Description:** Adopting a new rule to establish a mail order prescription service for Medicaid clients, as directed by chapter 371, Laws of 2002.

Adopted Feb. 13, 2003 as WSR 03-05-043

Months to complete this rule-making: 8 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment. No comments received.

E. Chapter 388-530, Pharmacy services

i. **Description:** Revising pharmacy provider reimbursement methodology and adding language to comply with federal requirements on billing units.

Adopted Aug. 9, 2002 as WSR 02-17-023

Months to complete this rule-making: 8 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

F. Chapters 388-531 WAC, Physician-related services; and 388-543 WAC, Durable medical equipment.

i. **Description:** Amending rules to comply with the federal Health Information Portability and Accountability Act.

Adopted Sept. 12, 2003 as WSR 03-19-081, 03-19-082, and 03-19-083

Months to complete this rule-making: 5 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

G. WAC 388-532 WAC, Family planning services

i. **Description:** Adopting the new Take Charge family planning program, begun as a pilot program in 2001. The program implemented a 1999 statute, SSB 5968.

Adopted Oct. 8, 2002 as WSR 02-21-021

Months to complete this rule-making: 27 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

H. WAC 388-533-0400, Maternity care and newborn delivery.

i. **Description:** Adding coverage for smoking cessation counseling and education services for pregnant women eligible for Medicaid.

Adopted March 13, 2002

as WSR 02-07-043

Months to complete this rule-making: 8 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

I. WAC 388-533-1000, First Steps childcare program

i. **Description:** Amending the rule to ensure that background check requirements are consistent with the DSHS Background Check Central Unit rules and Washington State Patrol policies.

Adopted Sept. 4, 2003 as WSR 03-19-010

Months to complete this rule-making: 10 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

J. Chapter 388-534 WAC, Enhanced payment for EPSDT screening for children receiving foster care placement services from DSHS.

i. **Description:** Adopting rules to encourage medical providers to increase the number of children in foster care receiving Early Periodic Screening, Diagnosis and Treatment services.

Adopted March 8, 2002 as WSR 02-07-016

Months to complete this rule-making: 6 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

K. Chapter 388-535 WAC, Dental related services.

i. **Description:** Revising rules to clarify dental provider requirements; clarify covered and non-covered services; clarify denture, partial and laboratory fee policies; update definitions; and to revise the rules to meet requirements of Executive Order 97-02.

Adopted June 14, 2002 as WSR 02-13-074

Months to complete this rule-making: 20 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

L. Chapter 388-535 WAC, Dental-related services.

i. **Description:** Revising rules to comply with the 2003-2005 budget bill, ESSB 5404; and to comply with the federal Health Information Privacy and Accountability Act.

Adopted Sept 12, 2003 as WSR 03-19-080

Months to complete this rule-making: 5 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

M. Chapter 388-538 WAC, Managed care.

i. **Description:** Adopting rules to comply with the federal Balanced Budget Act of 1997; and adding information from the Healthy Options/State Children's Health Insurance Program (SCHIP) concerning emergency services

Adopted Sept. 2, 2003 as WSR 03-18-109, 03-18-110, 03-18-111, and 03-18-112

Months to complete this rule-making: 4.5 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

N. Chapter 388-540, Kidney dialysis and kidney center services

i. **Description:** Adopting rules to comply with federal Medicaid requirements; to meet DSHS cost containment initiative budget targets; and comply with Executive Order 97-02 on regulatory improvement.

Adopted Oct. 8, 2003 as WSR 03-21-039

Months to complete this rule-making: 19 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

O. Chapter 388-543 WAC, Durable medical equipment

i. **Description:** Revising rules to change the name "Augmentative Communication Device" to "Speech Generating Device;" describing covered speech generating devices; and to comply with the federal Health Information Portability and Accountability Act.

Adopted Aug. 1, 2002 as WSR 02-16-054

Months to complete this rule-making: 18 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

P. WAC 388-543-1225, Provider requirements

i. **Description:** Adopting a new rule establishing requirements for providers of durable medical equipment to department clients.

Adopted Feb. 14, 2003 as WSR 03-05-051

Months to complete this rule-making: 10 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

Q. Chapter 388-550 WAC, Hospital services.

- i. **Description:** Incorporating into rule the new Long-Term Acute Care program, a pilot program.

Adopted Feb. 14, 2002 as WSR 02-14-162

Months to complete this rule-making: 14 months.

- ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

R. Chapter 388-550 WAC, Hospital services

- i. **Description:** Amending rules regarding department policy for enhanced payments for trauma care and grants administered by the DSHS Medical Assistance Administration.

Adopted Oct. 8, 2002 as WSR 02-21-019

Months to complete this rule-making: 8 months.

- ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

S. Chapter 388-550 WAC, Hospital services

- i. **Description:** Revising rules to clarify the per diem rate for Long-Term Acute Care.

Adopted Dec. 26, 2002 as WSR 03-02-056

Months to complete this rule-making: 4 months.

- ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

T. Chapter 388-550 WAC , Hospital services

i. **Description:** Adopting department contract language on Acute Physical Medicine and Rehabilitation services into rule, removing “Level B” program services.

Adopted Feb. 28, 2003 as WSR 03-06-047

Months to complete this rule-making: 29 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program’s process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

U. Chapter 388-550 WAC, Hospital services

i. **Description:** Clarifying the payment method used to determine certain payments through the disproportionate share hospital program, and for the proportionate share hospital program.

Adopted June 12, 2003 as WSR 03-13-055

Months to complete this rule-making: 18 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program’s process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

V. New WAC 388-550-2598, Critical access hospital program

i. **Description:** Adopting a new rule to comply with 2001 session law, House Bill 1162.

Adopted June 18, 2003 as WSR 02-13-099

Months to complete this rule-making: 8 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program’s process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

W. Chapter 388-550 WAC, Hospital services.

i. **Description:** Revising rule to comply with the federal Health Information Portability and Accountability Act, and to clarify department policy and business practices.

Adopted Sept. 10, 2003 as WSR 03-19-043, 03-19-044, 03-19-045, and 03-19-046

Months to complete this rule-making: 4 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

X. Chapter 388-551 WAC, Home health services.

i. **Description:** Revising rules to remove references to "homebound" criteria to meet requirements of the federal Centers for Medicare and Medicaid; and to update the rules to reflect current department practices, and to be consistent with Department of Health rules.

Adopted July 15, 2002 as WSR 02-15-082

Months to complete this rule-making: 18 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

Y. Chapter 388-557 WAC, Disease management program.

i. **Description:** Establishing a new Disease Management Program in rule, a pilot program, as directed by the 2001-03 budget bill - chapter 7, Laws of 2001.

Adopted June 12, 2003 as WSR 03-13-054

Months to complete this rule-making: 14 months.

ii. **Stakeholder comments related to the impact of this significant legislative rule, or your Program's process of involving stakeholders to develop this rule:**

Working drafts of the rule were sent to all persons who responded to the CR-101. In addition, MAA sends working drafts of all rules to all Tribal Clinic Directors and Tribal Chairs for review and comment.

APPENDIX C

November 14, 2003

To: Marty Brown, Director
Office of Financial Management

From: Gary Smith, Executive Director
Independent Business Association

Subject: Reports On Impacts of ESHB 1010 – Significant Legislative Rulemaking

You asked the question: "How has significant legislative rulemaking been implemented and any affects the statutory changes have made on your membership or organization."

Are responses are as follows:

- We feel that most state agencies made a serious attempt to comply with the significant legislative rule statute, but few truly captured the true spirit or intent of the legislation.
- A good example of the above statement was the need to pass SB 5256 in 2003 requiring the agencies to provide their cost/benefit analyses prior to the public hearing rather than when they filed their CR-103. Clearly, the spirit and intent of the legislation was to consider the cost/benefit of a rule in the development process of the rule, including at the public hearing, and not leave that analysis to the end of the rule making process after the public input had been received.
- We can remember almost no examples of where agencies have truly considered "alternative versions" of a rulemaking approach. Agencies did include statements in their rulemaking file stating that they did consider "alternative versions" to a proposal they did move forward for adoption, but in most cases those statements and considerations were primarily meant to meet the statutory requirement of having considered "alternative versions" and there was not any real serious consideration of alternatives.
- We find that most agencies did not take seriously the intent or purpose of the requirement for an "implementation plan" to be filed before adopting a significant legislative rule. Again, the implementation plans were generally provided to meet the statutory requirement and our experience was that the agency follow-through was very weak at best.
- The provision of the statute to "inform and educate affected persons about the rule" was un-met by most state agencies and thus brought about SB 5766 which was approved in 2003 to more directly address this need for informing and educating persons affected by a rule.
- The significant legislative rulemaking statutes have resulted in the agencies generating more data and information about a proposed rule to meet the statutory requirements and that data and information has generally been revealed at or near the end of the rulemaking process and thus has given little to no opportunity for public discussion of the data or information.
- We greatly regret the almost total avoidance of using the pilot rule process in developing a significant legislative rule. We sincerely feel this is one of the best ways to test a rule being considered for adoption to determine its effects.

Overall, we at the Independent Business Association feel that the underlying statute for "significant legislative rules" is sound public policy and if implemented as intended in 1995 could have and can in the future, result in significant legislative rules that achieve their purpose in the least burdensome way possible and thus greatly reduce a number of the post rule adoption conflicts which have resulted in recent years.

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